

SUPREME COURT OF KENTUCKY

No. _____

CSX TRANSPORTATION, INC.,

MOVANT,

v.

JOHN X. BEGLEY,

RESPONDENT.

APPEAL FROM COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2007-CA-001380-MR

MOTION FOR DISCRETIONARY REVIEW

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 8th day of September, 2008, copies of this Motion for Discretionary Review were served by U.S. Express Mail, postage prepaid, on: Alva A. Hollon, Jr., Sams & Hollon, P.A., 9424 Baymeadows Road, Suite 160, Jacksonville, Florida 32256, counsel for respondent; Thomas I. Eckert, P.O. Box 7272, Hazard, Kentucky 41702, co-counsel for respondent; and Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

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I. INTRODUCTION

This case involves the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, the statute that governs claims by railroad employees against their employers for workplace injuries. The question presented is whether the Circuit Court committed reversible error in refusing to instruct the jury on two issues relating to liability and two issues relating to damages. The Court of Appeals erroneously concluded that it did not.

Respondent John X. Begley sued movant CSX Transportation, Inc. (CSXT) under FELA. As relevant here, CSXT asked the Circuit Court to instruct the jury on (1) proximate causation, (2) foreseeability, (3) the non-taxability of damages, and (4) the need to reduce to present value any award for future pain and suffering. The Circuit Court refused each of the tendered instructions, and the Court of Appeals affirmed. The Court of Appeals held that (1) proximate causation is not required under FELA, (2) the concept of foreseeability was adequately conveyed by the instruction on duty of care, (3) the failure to give a non-taxability instruction was harmless error, and (4) an award for future pain and suffering should not be reduced to present value.

Each of those holdings is manifestly incorrect. Each of them conflicts with decisions of other courts. And each of them has recurring importance, because there is a high volume of litigation under FELA and the issues decided by the Court of Appeals can arise in virtually every FELA case. Review by this Court is therefore warranted.

First, proximate causation is required under FELA. In holding that it is not, the Court of Appeals relied upon (and declined to revisit) its prior decision in *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272 (Ky. Ct. App. 2006), which understood the U.S. Supreme Court's decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), to hold that proximate causation is not an element of a FELA claim. As many other courts have recognized,

that understanding of *Rogers* is mistaken. In *Norfolk Southern Railway Co. v. Sorrell*, 127 S. Ct. 799 (2007), a post-*Hamilton* case, the U.S. Supreme Court reaffirmed the principle that FELA incorporates common-law rules of negligence unless the statute expressly provides otherwise. Because proximate causation was a firmly established element of common-law negligence when FELA was enacted (as it is today), and because the statute does not expressly abrogate that rule, proximate causation is an element of a FELA claim. As three Justices explained in a concurring opinion in *Sorrell*, moreover, the Court’s decision in *Rogers* is not to the contrary. *Rogers* was about “the occasional *multiplicity* of causations” and, in particular, about whether a railroad is liable when the injury is caused in part by factors other than the railroad’s negligence; it was not about proximate causation—“the necessary *directness* of cognizable causation.” *Id.* at 811 (Souter, J., joined by Scalia and Alito, JJ., concurring) (emphasis added).

Second, the concept of foreseeability was not adequately conveyed by the Circuit Court’s instruction on duty of care. Common-law foreseeability relates to the risk of *injury*, whereas the duty-of-care instruction asked the jury to determine only which general “risks or dangers” CSXT should have recognized. The two concepts—risk in general and the risk of injury—are not the same, as both common-law and FELA precedents, including decisions of this Court, make plain.

Third, the Circuit Court’s failure to give a non-taxability instruction was not harmless error. In holding that it was, the Court of Appeals relied on the fact that the damages awarded by the jury did not exceed the amount that Begley requested. That holding reflects a fundamental misapplication of harmless-error analysis, because the effect of an erroneous failure to instruct on the non-taxability of damages ordinarily cannot be ascertained from the record. In similar circumstances, this Court has required reversal as a default rule, a result endorsed by other courts in FELA cases raising the same issue that is presented here.

Fourth, an award for future injuries must be reduced to present value. In holding that an award for future pain and suffering need not be, the Court of Appeals reasoned that the determination of such an award is inherently speculative. There is no basis for limiting the requirement that damages be reduced to present value, however, to awards that are easily ascertainable by juries. Instead, as the Second Circuit has recognized, reduction to present value is required because awards for future pain and suffering—like awards for any injuries yet to occur—are received in advance of the compensable harm.

II. INFORMATION REQUIRED BY CR 76.20(3)

A. Movant CSXT, the defendant-appellant below, is represented by James W. Turner, James E. Cleveland, III, and Alexander C. Ward, Huddleston Bolen LLP, 1422 Winchester Avenue, P.O. Box 770, Ashland, Kentucky 41105, and Evan M. Tager, Dan Himmelfarb, Michael Passaportis, Mayer Brown LLP, 1909 K Street, N.W., Washington, D.C. 20006.

B. Respondent Begley, the plaintiff-appellee below, is represented by Alva A. Hollon, Jr., Sams & Hollon, P.A., 9424 Baymeadows Road, Suite 160, Jacksonville, Florida 32256, and Thomas I. Eckert, P.O. Box 7272, Hazard, Kentucky 41702.

C. The Court of Appeals rendered its opinion on August 8, 2008. App. C.

D. A supersedeas bond has been executed.

E. No party has a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

III. STATEMENT OF MATERIAL FACTS

Respondent Begley worked for CSXT at its railroad yard in Hazard, Kentucky from 1970 until his retirement in 1998. Part of his duties involved mounting and dismounting slow-moving

train cars, a practice that CSXT prohibited at the beginning of 1990. After his retirement, Begley sought treatment for pain in his knees and hips. In 2003, he filed suit against CSXT under FELA, seeking \$500,000 for pain and suffering relating to these ailments, which he claimed were caused by his job activities while working for CSXT. App. C at 1-2.

At trial, the parties contested the issue of causation. Begley's chief causation witness testified that he had osteoarthritis in the knees and hips, a progressively degenerative condition. On direct examination, the witness stated that this ailment resulted in part from mounting and dismounting moving trains. The witness withdrew that opinion on cross-examination, however, after conceding that he was unaware that CSXT had banned this practice in 1990. Although the witness claimed again on redirect examination that Begley's work contributed to his condition, he added the proviso, on recross-examination, that Begley's obesity and age were greater contributing factors. CSXT's causation witness testified that neither the arthritis in Begley's hips—which he believed was caused by an autoimmune disease—nor the arthritis in Begley's knees resulted from his work activities at CSXT. *Id.* at 4; CSXT C.A. Br. 3-4, 10.

CSXT tendered a number of jury instructions on both liability and damages. On the issue of causation, CSXT requested an instruction asking the jury to determine whether any negligence on CSXT's part "contributed proximately, in whole or in part, to plaintiff's injury" and directing the jury to find for CSXT if such negligence was only "an indirect or remote cause of his injury." App. D at 1. On the issue of negligence, CSXT requested an instruction asking the jury to determine whether "the claimed injuries to the Plaintiff [were] not reasonably foreseeable by the railroad." *Id.* at 2. On the issue of damages, CSXT requested that the jury be instructed that any damages award "is not subject to federal or state income taxes" and that the jury "should not consider such taxes in fixing the amount of an award made to plaintiff." *Id.* at 3. CSXT also

requested an instruction requiring the jury to reduce any award for future pain and suffering to present value. *Id.* at 4. The Circuit Court refused each of the tendered instructions. App. C at 6, 7, 8, 10.

The jury returned a verdict awarding Begley \$250,000, which was reduced to \$125,000 because of Begley's comparative negligence. *Id.* at 2. The Circuit Court entered judgment in favor of Begley (App. A) and denied CSXT's motions for judgment notwithstanding the verdict and for a new trial (App. B). On appeal, CSXT argued, as relevant here, that the trial court had committed reversible error by refusing to give the instructions described above. The Court of Appeals rejected CSXT's contentions (App. C at 6-9, 10-11) and affirmed the Circuit Court's judgment (App. C).

IV. QUESTIONS OF LAW INVOLVED

1. Whether the jury in a FELA case should be instructed that a plaintiff must prove that the defendant's negligence was the proximate cause of the plaintiff's injury.
2. Whether the jury should have received a separate foreseeability instruction in addition to the general standard-of-care instruction.
3. Whether the Court of Appeals improperly applied the harmless-error standard to the Circuit Court's erroneous refusal to instruct the jury that its damages award would not be subject to taxation.
4. Whether the jury in a FELA case should be instructed to reduce its award for future pain and suffering to present value.

V. REASONS WHY THE JUDGMENT SHOULD BE REVIEWED

Enacted in 1908, FELA provides a compensation scheme for injuries sustained by railroad employees in the workplace. Unlike worker's compensation laws, which typically

provide relief without regard to fault, FELA requires an injured railroad employee to prove that his or her employer was negligent. 45 U.S.C. § 51. FELA provides for concurrent jurisdiction of state and federal courts (*id.* § 56), but the standards for both liability and damages under the statute are governed by federal law. *See, e.g., Urie v. Thompson*, 337 U.S. 163, 174 (1949); *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 491 (1916). Under long-settled precedent of the U.S. Supreme Court, including its recent decision in *Sorrell*, the elements of a FELA claim are determined “by reference to the common law” unless the statute contains “express language to the contrary.” *Sorrell*, 127 S. Ct. at 805; *accord, e.g., Urie*, 337 U.S. at 182.

In affirming the Circuit Court’s refusal to give CSXT’s tendered jury instructions on liability, the Court of Appeals deviated from this interpretive methodology in two respects. First, because proximate causation is an established element of common-law negligence and nothing in FELA dispenses with it, the jury should have been instructed that Begley was required to establish that CSXT’s negligence proximately caused his injury. *See Point A, infra*. Second, because common-law foreseeability means foreseeability of the risk of *injury* and nothing in FELA alters that meaning, the instruction on the general duty of care, which did not advert to the risk of injury, was insufficient to convey the requirement of foreseeability. *See Point B, infra*.

The Court of Appeals also erred in two respects in upholding the Circuit Court’s refusal to give CSXT’s tendered jury instructions on damages. First, because it is impossible to determine the effect of the failure to give a non-taxability instruction, it cannot be said that the failure was non-prejudicial and therefore harmless. *See Point C, infra*. Second, because the earning power of the present use of compensation for a lost future benefit is the same regardless of what the future benefit is, the jury should have been instructed that a damages award for future

pain and suffering, like any other award for an injury yet to occur, must be reduced to present value. *See* Point D, *infra*.

A. A Jury In A FELA Case Should Be Instructed On Proximate Causation

One of the most fundamental “common-law concepts of negligence” (*Urie*, 337 U.S. at 182) is proximate causation—the requirement that there be “some direct relation between the injury asserted and the injurious conduct alleged” (*Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). Indeed, proximate causation was an established element of common-law negligence long before FELA was enacted. *See, e.g.*, 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed. 1898). Under the established interpretive methodology, therefore, proximate cause is a requirement in FELA cases, unless the statute expressly abrogates it.

Nothing in FELA dispenses with proximate causation. To the contrary, the U.S. Supreme Court has recognized that, “to recover under [FELA], it [i]s incumbent upon [the plaintiff] to prove that [the defendant] was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident.” *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32 (1944). A number of the Court’s other decisions confirm that requirement. *See, e.g.*, *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 435 (1949); *Urie*, 337 U.S. at 177; *Coray v. S. Pac. Co.*, 335 U.S. 520, 523 (1949); *Nw. Pac. R.R. Co. v. Bobo*, 290 U.S. 499, 503 (1934); *St. Louis-S.F. Ry. Co. v. Mills*, 271 U.S. 344, 347 (1926).

In reaching a contrary conclusion, the Court of Appeals relied on its prior decision in *Hamilton*. App. C at 6-7. That decision understood the U.S. Supreme Court’s decision in *Rogers* to have adopted a rule of causation that “depart[s] from traditional common-law tests of

proximate causation.” *Hamilton*, 208 S.W.3d at 278. *Hamilton*’s understanding of *Rogers* is mistaken, as the three-Justice concurrence in *Sorrell* shows.

The Court’s opinion in *Sorrell* addressed whether the causation standard for a defendant’s negligence under FELA is the same as that for a plaintiff’s contributory negligence. Applying the common-law rule, the court held that it is. 127 S. Ct. at 805-09. The petitioner in *Sorrell* had also asked the Court to decide what that standard of causation is—the question presented here—and to hold that proximate causation is required. The Court declined to reach that issue, because it was not one on which certiorari had been granted. *Id.* at 803-805.

The three-Justice concurrence by Justice Souter did address the issue, however, and concluded that a FELA plaintiff must prove proximate causation. *Id.* at 809-12 (Souter, J., joined by Scalia and Alito, JJ., concurring). As the concurrence explained, proximate cause was required before *Rogers*, and “*Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm.” *Id.* at 809-10. Instead, “the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury.” *Id.* at 810. In that circumstance, *Rogers* held, a FELA defendant is liable no matter how slightly his fault contributed to the injury.

Rogers did not suggest that a defendant’s fault, whether the sole or the partial cause of the plaintiff’s injury, was actionable if it was not a *direct* cause of the injury. That is a topic addressed by the doctrine of proximate causation, which, under the established interpretive methodology, is governed by the common law. The Court’s decision in *Rogers* is therefore “no authority for anything less than proximate causation in an action under FELA.” *Id.* at 812 (Souter, J., concurring). Indeed, a jury instruction in *Rogers* that the Court did not disturb referred to “proximate cause” (*see Rogers*, 352 U.S. at 505 n.9) and precedents that the Court

cited in its opinion (*see id.* at 506 n.11 (citing *Coray*, 335 U.S. at 523); *id.* at 507 n.13 (citing *Carter*, 338 U.S. at 435)) explicitly hold that a FELA plaintiff must establish proximate cause.

Although several state supreme courts have correctly applied the common-law proximate-cause requirement in FELA cases (*see Sorrell*, 127 S. Ct. at 809 n.* (Souter, J., concurring)), a number of other courts applying FELA have relied on the same misreading of *Rogers* that the Court of Appeals adopted in *Hamilton* (*see id.*). The three-Justice concurrence in *Sorrell* demonstrates the error of these precedents. Even if *Hamilton* were defensible when it was decided, therefore, it should be revisited in light of Justice Souter’s concurrence in *Sorrell*, which was issued after *Hamilton* and is the best guide to causation under FELA.

CSXT requested that the Court of Appeals reconsider *Hamilton*, but it declined to do so. App. C at 6-7. This Court should grant review to ensure that FELA, an important federal statute that generates substantial litigation in Kentucky courts, is applied properly in light of the recent guidance in *Sorrell*. Review is particularly warranted in this case, where the parties hotly disputed causation at trial and Begley’s own evidence on the issue was internally inconsistent. *See* p. 4, *supra*.¹

B. The Jury Should Have Received A Separate Instruction On Foreseeability

Foreseeability is also a requirement of common-law negligence, and therefore must be found by the jury in a FELA case. *E.g.*, *Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108, 117 (1963). The Court of Appeals did not hold otherwise. Rather, it found that the Circuit Court’s general duty-of-care instruction was sufficient to apprise the jury of the foreseeability requirement. The court’s instruction stated that CSXT’s duty of care “included the duty to guard against *risks or dangers* of which it knew, or by the exercise of ordinary care should have

¹ The same issue is presented in the motion for discretionary review in *CSX Transportation, Inc. v. Cooke*, No. 2008-SC-331-D, now pending before this Court.

known.” App. C at 7 (emphasis added). CSXT’s tendered instruction would have asked the jury to determine whether “the claimed *injuries* to the Plaintiff [were] reasonably foreseeable by the railroad.” App. D at 2 (emphasis added).

The Court of Appeals erred. Foreseeability under the common law, and therefore under FELA, is concerned, not with “risks or dangers” in the abstract (an aspect of the general duty of care, as the Circuit Court’s instruction reflected), but instead with the risk or danger of compensable *injury*. The case law on the foreseeability requirement makes that clear. The former Kentucky Court of Appeals has said that it is a “fundamental principle of negligence” that “[e]very person owes a duty to every other person to exercise ordinary care in his activities to prevent any *foreseeable injury* from occurring to such other person.” *M & T Chems., Inc. v. Westrick*, 525 S.W.2d 740, 741 (Ky. 1974) (emphasis added). The Eighth Circuit has likewise emphasized that a FELA plaintiff “must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause *injury*.” *Davis v. Burlington N., Inc.*, 541 F.2d 182, 185 (8th Cir. 1976) (emphasis added). Viewed against these standards, the general duty-of-care instruction given by the Circuit Court was deficient.

The distinction between risks in general and compensable injuries in particular is not an academic one. Without a proper instruction on the foreseeability of injuries, a jury could well find liability under FELA based on its conclusion that the activity in question was generally risky, without determining that the defendant should have been aware that its risky conduct was also potentially injurious (a requirement that a separate foreseeability instruction ensures is met). Recognizing this possibility, the Supreme Court of Texas has held that FELA juries must be charged separately on the issue of foreseeability when contested. *See Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162 (Tex. 2002). The court reasoned that, although “there is no serious

dispute” that the activity in question “by its very nature [] could be potentially hazardous in a general sense * * *, something more than a generalized threat is necessary to show foreseeability as it relates to the railroad’s duty.” *Id.* at 169. Rather, the court held, “the question is whether [the defendant] knew or should have known that [the activity] created a likelihood that [the plaintiff] would suffer the type of injury he did.” *Id.* The Court of Appeals did not allow the jury to consider that question here, and it thereby diverged from the common-law doctrine that must apply in a FELA case. This Court should grant review.²

C. The Failure To Instruct The Jury On The Non-Taxability Of Damages Was Reversible Error

The U.S. Supreme Court has squarely held that the jury in a FELA case must be instructed that any damages it awards are not taxable. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 496-98 (1980). The Court of Appeals recognized that the Circuit Court had erred in failing to give such an instruction. App. C at 8. It deemed the error harmless, however, reasoning that “[t]he record in this case fails to reveal evidence that the jury inflated the award of damages to compensate for income taxes.” *Id.* at 9.

The Court of Appeals’ holding is at odds with *Liepelt*, which reversed on the basis of the same failure to instruct. The jury’s award in *Liepelt* was greater than the amount requested at trial, and the Court speculated that the jury may have incorrectly believed that the award would be taxed. 444 U.S. at 497. The Court nevertheless held that reversal was required “[w]hether or not this speculation is accurate.” *Id.* at 498. Under *Liepelt*, therefore, the failure to give a non-taxability instruction is reversible *per se*.

Even if *Liepelt* does not require automatic reversal, however, straightforward application of the Kentucky harmless-error standard does. In applying the harmless-error rule, courts assess

² A similar issue is presented in the motion for discretionary review in *CSX Transportation, Inc. v. Moody*, No. 2007-SC-548, now pending before this Court.

what the result of the proceedings would have been if the error had not occurred. *See, e.g., Holt v. Peoples Bank of Mt. Washington*, 814 S.W.2d 568, 571 (Ky. 1991) (error is harmless under CR 61.01 if “the result would have been the same” absent error). In the typical case of instructional error, the trial record gives the reviewing court a basis on which to make that assessment. When the instructions omit reference to an element of the claim, for instance, the reviewing court can consider whether the evidence establishes the omitted element. *See, e.g., Risen v. Pierce*, 807 S.W.2d 945, 946-48 (Ky. 1991).

The instructional error in this case is fundamentally different. The danger the non-taxability instruction guards against is that the jury will inflate its award beyond its determination of the plaintiff’s actual loss to compensate for non-existent taxes. *See Leipelt*, 444 U.S. at 497. When the instruction is improperly omitted, therefore, application of ordinary harmless-error principles requires the reviewing court to determine whether inflation of that sort in fact occurred. That, in turn, requires an assessment of the proper measure of the plaintiff’s loss. *Id.*

At least in the absence of a special verdict, however, there is simply no basis for the reviewing court to make that assessment. In concluding that the error here was harmless, the Court of Appeals found it significant that the jury’s award for pain and suffering was less than what Begley requested. App. C at 8. But the jury was entitled to place a lower value on Begley’s claimed damages than the amount he requested at trial, particularly because he sought recovery only for pain and suffering, which is difficult to quantify. There is nothing in the record, moreover, from which to determine whether the jury did in fact discount Begley’s evidence in this manner. To assume that it did not do so is no more than rank speculation.

The question, therefore, is how to review an error when its effect is impossible to determine from the trial record. Kentucky law on harmless error already answers that question.

It is a “longstanding” rule that “erroneous instructions to the jury are presumed to be prejudicial [and] an appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error.” *Hamilton*, 208 S.W.3d at 276 (internal quotation marks omitted). If the record does not allow such a showing to be made, therefore, the erroneous ruling must be reversed.

Precedent from this Court confirms that result. In reversing in a case in which an attorney improperly mentioned extra-record evidence during summations, the Court emphasized that “[a] party aggrieved by egregious argument should not be required to demonstrate prejudice, ordinarily an impossible task, for to do so would in most cases render reviewing courts powerless to correct the error.” *Risen*, 807 S.W.2d at 949. Precisely the same reasoning applies here. *See also O’Byrne v. St. Louis Sw. Ry. Co.*, 632 F.2d 1285, 1287 (5th Cir. 1980).

This Court should grant review to correct the Court of Appeals’ misapplication of harmless-error analysis. Review is particularly warranted because courts are divided over how to conduct harmless-error analysis when the trial court fails to give a non-taxability instruction in a FELA case. Although some courts have mistakenly followed the same approach as the Court of Appeals here (*see, e.g., Flanigan v. Burlington N., Inc.*, 632 F.2d 880 (8th Cir. 1980); *Anderson v. Burlington N., Inc.*, 709 P.2d 641, 646 (Mont. 1985)), at least two courts have held that reversal is required without regard to the amount of the verdict (*see O’Byrne*, 632 F.2d at 1287; *Watson v. Norfolk & W. Ry. Co.*, 507 N.E.2d 468, 471 (Ohio Ct. App. 1987)), and at least two others have reversed without conducting any harmless-error analysis (*see Onion v. Chi. & Ill. Midland Ry. Co.*, 547 N.E.2d 721, 723 (Ill. App. Ct. 1989); *Sheff v. Conoco, Inc.*, 311 S.E.2d 14 (N.C. Ct. App. 1984)).³

³ The same issue is presented in the motion for discretionary review in *CSX Transportation, Inc. v. Moody*, No. 2007-SC-548, now pending before this Court.

D. A Jury In A FELA Case Should Be Instructed To Reduce Any Award For Future Pain And Suffering To Present Value

The general rule is that an award of damages to compensate the plaintiff for future events must be reduced to present value. *E.g., Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 536-37 (1983). The Court of Appeals did not hold otherwise. Rather, it held that the general rule does not apply to awards for future *pain and suffering* and that juries in FELA cases should not be instructed to reduce awards of that type to present value. App. C at 12. The court's holding rests on a basic misunderstanding of the rationale for reducing damages awards to present value.

The Court of Appeals relied on the Eighth Circuit's reasoning in *Flanigan*. That decision stated that “[t]he same amount of pain and suffering does not occur from year to year nor can the degree of pain and suffering that will occur in any year be quantified with any degree of certainty.” 632 F.2d at 886. On that basis, *Flanigan* concluded that “[r]equiring the reduction of an award for pain and suffering to its present value would improperly allow a jury to infer that pain and suffering can be reduced to a precise arithmetic calculation.” *Id.*

That reasoning is flawed in two respects. First, in a case such as this, where the plaintiff's claim to damages for future pain and suffering rests entirely on the effects of a progressively degenerative condition like arthritis, there is no reason to question the jury's ability to quantify the amount of damages over time. Second, whether or not awards of this kind are inherently speculative, the fact remains that awards for future pain and suffering—like awards for any injuries yet to occur—are received in advance of the compensable harm. Recognizing that fact, a number of courts considering the issue outside the FELA context have required damages awards to take into account the reasonable rate of return that a plaintiff may earn, even when the award is for future pain and suffering. *See, e.g., Abernathy v. Superior Hardwoods*,

Inc., 704 F.2d 963, 973 (7th Cir. 1983); *Sweeney v. Car/puter Int'l. Corp.*, 521 F. Supp. 276, 287-88 (D.S.C. 1981); *Abbott v. Nw. Bell Tel. Co.*, 246 N.W.2d 647, 650 (Neb. 1976). The Second Circuit, for example, has recognized that “[t]he earning power of the present use of money is the same, regardless of the particular future benefit claimed to be lost.” *Metz v. United Techs. Corp.*, 754 F.2d 63, 67 (2d Cir. 1985).

Unlike the Eighth Circuit (and the Court of Appeals here), moreover, the Second Circuit has held that awards for future pain and suffering in FELA cases must be reduced to present value. *See DeChico v. Metro-N. Commuter R.R.*, 758 F.2d 856, 860 (2d Cir. 1985). The U.S. Supreme Court embraced the same rationale in an early FELA case, observing that, “when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only.” *Kelly*, 241 U.S. at 491. Although that case involved only damages for future pecuniary loss (*see id.* at 488), its reasoning applies equally to any award for losses yet to be incurred. This Court should grant review.

VI. CONCLUSION

For the foregoing reasons, discretionary review should be granted.

Respectfully submitted,

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